



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**
Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA08014
Order LA08-07**

IN THE MATTER of an appeal by
George Kelly of a decision of the Minister of
Communities, Cultural Affairs and Labour,
dated June 10, 2008.

BEFORE THE COMMISSION
on Thursday, the 2nd day of October, 2008.

Maurice Rodgerson, Chair
Ernest Arsenault, Commissioner
Gordon McCarville, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by
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IN THE MATTER of an appeal by
George Kelly of a decision of the Minister of
Communities, Cultural Affairs and Labour,
dated June 10, 2008.

Appearances & Witnesses

1. For the Appellant George Kelly:

George Kelly (representing himself)

Witnesses

Ralph McQuaid
Mary Boyd
Rita Kelly
Bill Costain

2. For the Respondent Minister of Communities, Cultural Affairs and Labour:

Representative

Garth Carragher

3. For the Developer Brad Curran:

Brad Curran (representing himself)

IN THE MATTER of an appeal by
George Kelly of a decision of the Minister of
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dated June 10, 2008.

Reasons for Order

1. Introduction

[1] The Appellant George Kelly (Mr. Kelly) has filed an appeal with the Island Regulatory and Appeals Commission (the Commission) under section 28 of the *Planning Act*, R.S.P.E.I. 1988, Cap. P-8, (the *Planning Act*). Mr. Kelly's Notice of Appeal was received on July 9, 2008.

[2] This appeal concerns the June 10, 2008 decision of the Respondent Minister of Communities, Cultural Affairs and Labour (the Minister), to grant preliminary approval to the Developer Brad Curran (Mr. Curran) for a subdivision of eight residential lots from property number 131029 (the subject property) located at Blooming Point.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on September 3, 2008.

2. Discussion

Mr. Kelly's Position

[4] Mr. Kelly's submissions may be briefly summarized as follows:

- The subject property is not zoned and there are no restrictions on what it can be used for. All further development of such land needs to be halted until a province-wide zoning and development plan can be implemented.
- The subject property was previously prime agricultural land. Such agricultural land needs to be protected for its original purpose. Residential developments should only be considered on land that is not prime agricultural land.

- Surveyors illegally trespassed on Mr. Kelly's land adjoining the subject property as the surveyors did not provide notice or seek permission to enter the Kelly property.
- The results of the survey of the subject property were not shared with adjacent property owners. The north boundary exceeds historically accepted boundaries by approximately five feet. The historically accepted property line was mutually agreed to by the former property owners. Loss of this property and shrubs planted on it will adversely affect the value of the Kelly property. All development on the subject property must be halted until a legal survey can be done and agreed to by all adjacent property owners.
- There does not appear to have been any environmental assessment done related to the potential impact of the subdivision prior to its approval. The impact of additional wells, septic fields, water drainage patterns and increased noise as a result of the development of these eight residential lots need to be considered. All development of the subject property must be halted until an environmental assessment is completed and the results made available for public review and comment.
- The subdivision of the subject property was approved without any notice to surrounding landowners and the community. Development may have significant consequences for surrounding landowners and the community as a result of potential environmental impact, increased traffic and noise, loss of historic views, loss of property values and the potential for increased property assessments. A loss of community identity may also occur due to a lack of input into the development of the community and an influx of people with no planned connections to the surrounding community. All development of the subject property must be halted until written evidence, demonstrating that the above potential consequences were considered by the Minister, has been made available to the public for review and comment.

[5] Mr. Kelly requests that the Commission allow his appeal and quash the decision to grant preliminary subdivision approval of the subject property.

The Minister's Position

[6] The Minister's representative reviewed, in chronological order, the process followed by the Minister's staff. The Minister's representative noted that Mr. Curran's application for a subdivision of the subject property met all requirements set out in the *Planning Act* and its regulations. As all requirements were met, the application for subdivision of the subject property was approved.

[7] The Minister's representative noted that the Department is not required to notify adjacent landowners of subdivision approval decisions. He also noted that a community may establish a community council and the Department would then consult with that council. Further, a community council may establish an official plan and bylaws to go with that official plan in order to make its own decisions with respect to land use within their community.

[8] The Minister requests that the Commission deny this appeal.

Mr. Curran's Position

[9] Mr. Curran noted that an adjustment of the boundary line might have an impact on the development of Lot 1 on the subject property. He noted that an adjustment of the boundary line would not affect the other lots, including Lot 4 which is near Mr. Kelly's home. He further noted that any dispute over the boundary line was not a matter for the Minister or the Commission to decide.

[10] Mr. Curran did not make any further submissions at the hearing.

3. Findings

[11] After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission to deny this appeal. The reasons for the Commission's decision follow.

[12] Subsection 28(1) of the **Planning Act** reads as follows:

28. (1) Subject to subsections (2), (3) and (4), any person who is dissatisfied by a decision of a council or the Minister in respect of the administration of regulations or bylaws made pursuant to the powers conferred by this Act may, within twenty-one days of the decision appeal to the Commission.

[13] In the present appeal, the Minister's decision was made on June 10, 2008 and Mr. Kelly's Notice of Appeal was filed on July 9, 2008 some 29 days later. While subsection 28(1) of the **Planning Act** requires the appeal to be received within twenty-one days of the decision, the Appeal Division of the Supreme Court of Prince Edward Island has ruled that the timing of the commencement of the twenty-one day appeal period may be affected by the notice, or lack of notice, given to the public.

[14] In *Booth and Peak v. Island Regulatory and Appeals Commission* 2004 PESCAD 18 (October 4, 2004) Justice Webber reviewed caselaw with respect to the issue of when an appeal period begins to run. She then stated the following commencing at paragraph 20:

[20] All these cases express a concern about ensuring that a right of appeal is a real rather than an illusory right.

[21] I find that Re Hache and Minister of Municipal Affairs (1969), 2 D.L.R. (3d) 186 (NBSCAD) applies in this province and the appeal period will begin to run when an appellant has received notice of the decision. This may be specific notice or general notice through posting or publication or by some other means. The bylaws of a community could establish the type of public notice that will be given upon the issuance of a building permit, e.g. publication in a newspaper or newsletter, posting in the community office. If the public can become aware of the decision by way of this public process then the process will likely satisfy the requirements of notice.

[22] *Where, as in this case there is no process of public notice set out in either the **Planning Act** or the bylaws of the community, then time can only begin to run when an appellant has actual notice of the decision. Just seeing the mobile home on the property would not be notice of the issuance of a building permit for that home. It might have been placed on the property without a permit.*

[23] *Such notice of a decision is essential to give meaning to the appeal process. If this were not the case, the right to appeal would be illusory, rendering the statutory right of appeal meaningless. It would not be reasonable to interpret the statute in a way that renders a given right meaningless. The law does not specify the manner in which notice to the public must be given but does state that there must be some public notice of a decision—or specific notice to persons affected by the development -- before an appeal period can be said to run. That being said, an appellant could not abuse this right by deliberately delaying inquiry after he/she had been put on notice that a decision appears to have been made. In the present case, the mobile home was placed on the property and the appellants became aware of that fact on June 24, 2003. There was then some responsibility on them to inquire about whether or not a permit had been issued.*

[15] In the present appeal, the Commission accepts Mr. Kelly's statement attached to his Notice of Appeal advising that he first became aware of the Minister's decision on June 20, 2008. The Commission notes that neither the Minister nor Mr. Curran questioned the Commission's jurisdiction to hear the present appeal. The Commission finds that the twenty-one day appeal period commenced on June 20, 2008 and therefore Mr. Kelly's appeal was filed within the statutory appeal period.

[16] Mr. Kelly has raised concerns over the location of the boundary line between his property and the subject property. He also believes that the surveyor illegally trespassed on his land. While the Commission has no jurisdiction over the **Land Survey Act**, R.S.P.E.I. 1988, Cap. L-2.1 and the **Land Surveyors Act**, R.S.P.E.I. 1988, Cap. L-3.1, the following provisions of those **Acts** should assist in clarifying the issue of alleged trespass:

Section 14 of the *Land Survey Act*

14. Every surveyor and his authorized assistants shall have free right of access to any station maintained by the chief surveyor for all necessary purposes of connection therewith in course of any survey, doing no unnecessary damage in such access and every surveyor and his authorized assistant while engaged in the duties of his profession may pass over, measure along and ascertain the bearing of any line or limit and for such purpose may pass over the lands of any person doing no actual damage to the property of such person.

Subsection 17(1) of the *Land Surveyors Act*

17. (1) Every land surveyor when engaged in the duties of the profession and anyone acting under his authority may enter on and pass over the lands and airspace of any person whomsoever, at the reasonable convenience of such person, doing as little damage as possible.

[17] The primary thrust of Mr. Kelly's appeal appears to be that, for several reasons, the subject property should not be subdivided into residential building lots. Many of these issues were previously raised by Mr. Kelly in Order LA07-11 which dealt with a different parcel of land for which preliminary subdivision approval was granted by the Minister.

[18] In Order LA07-11, the Commission noted:

[12] The Commission is a quasi-judicial administrative tribunal empowered by several statutes to perform various administrative, regulatory and appellate functions. In its appellate functions, it is the role of the Commission to consider the decisions of various municipal and ministerial decision makers to ensure that they have complied with the acts, regulations or bylaws which provide the legal foundation for their decision.

*[13] The present matter is an appeal of a decision of the Minister of Communities, Cultural Affairs and Labour in respect of the regulations made pursuant to the powers conferred by the **Planning Act**. These regulations include the Subdivision and Development Regulations and the Province-wide Minimum Development Standards Regulations.*

*[14] Appeals under the **Planning Act** generally take the form of a hearing de novo before the Commission. In an often cited decision which provides considerable guidance to the Commission, In the matter of Section 14(1) of the **Island Regulatory and Appeals Commission Act** (Stated Case), [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:*

it becomes apparent that the Legislature contemplated and intended that appeals under the Planning Act would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.

[15] The Appellant has provided the Commission with forceful and articulate arguments concerning the broad issue of the subdivision of rural land, especially land with good agricultural capability. These arguments have been made with considerable thought and effort and the Commission is impressed with the Appellant's commitment to this issue.

[16] The Commission commends the members of the public who participated in the hearing for their comments which reflect a much broader concern than the subdivision approval under appeal.

[17] Regardless of the conviction or persuasive power of the Appellant's argument, the Commission's role is not to stand in judgment of existing public policy or to fashion new policy initiatives. That role properly belongs with the Legislative Assembly of Prince Edward Island. The role of the Commission is akin to the role of the Courts: to ensure that the law as currently written has been complied with. However, unlike the Supreme Court, the Commission is a creature of statute and accordingly its jurisdiction is thus more limited.

*[18] The Commission notes that no breach of the **Planning Act** or its regulations was identified at the hearing of this matter. Rather, the Appellant focused on the need for reform of public policy relating to rural land use development.*

*[19] Having reviewed the file disclosed by the Respondent, the Commission cannot find any error on the part of the Respondent. The Commission finds that the Respondent followed the **Planning Act** and its regulations in granting preliminary subdivision approval to the subject property.*

*[20] In the event that the Commission had found that the Respondent had breached the requirements of the **Planning Act** or its regulations, the most extensive remedy that the Commission could provide would have been to quash preliminary approval of the subdivision of the subject property. The Commission does not have the jurisdiction to order the relief requested by the Appellant.*

[21] For the reasons stated throughout, the Commission hereby denies this appeal.

[19] In the present appeal, Mr. Kelly could not identify any error made by the Minister or her staff. Upon a review of the file disclosed by the Minister, the Commission could not identify any evidence of Ministerial error leading to the June 10, 2008 decision to grant preliminary subdivision approval to the subject property. Rather, Mr. Kelly's concerns would appear to be with public policy as it relates to rural land use on Prince Edward Island. As stated in Order LA07-11, the Commission's role is to decide whether or not the decision maker followed the present day law. In the present appeal, the Commission finds that the requirements of the **Planning Act** and its regulations were followed. Accordingly, the Commission denies this appeal.

4. Disposition

[20] An Order denying this appeal follows.

IN THE MATTER of an appeal by
George Kelly of a decision of the Minister of
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dated June 10, 2008.

Order

WHEREAS the Appellant George Kelly has appealed a decision of the Respondent Minister of Communities, Cultural Affairs and Labour, dated June 10, 2008;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on September 3, 2008 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Planning Act*

IT IS ORDERED THAT

1. The appeal is hereby denied.

DATED at Charlottetown, Prince Edward Island, this 2nd day of October, 2008.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*

Maurice Rodgerson, Chair

(Sgd.) *Ernest Arsenault*

Ernest Arsenault, Commissioner

(Sgd.) *Gordon McCarville*

Gordon McCarville, Commissioner

NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13.(1) and 13(2) of the *Act* provide as follows:

13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.

IRAC141A(99/2)